

2016 WL 4126153 (Utah P.S.C.)

In the Matter of the Application of Rocky Mountain Power for Approval of
the Power Purchase Agreement between PacifiCorp and Thayn Hydro, L.L.C.

Docket No. 16-035-04

Utah Public Service Commission

July 29, 2016

EXPURGATED VERSION OPINION AND ORDER

BEFORE: LeVar, Chair, Clark, and White, Commissioners.

Michael J. Hammer, Presiding Officer

1. PROCEDURAL BACKGROUND

*1 On February 4, 2016, PacifiCorp dba Rocky Mountain Power (“RMP”) filed its Application and Request for Expedited Approval (“Application”). The Application concerns RMP’s efforts to negotiate and execute a renewed power purchase agreement (“PPA”) with Thayn Hydro, L.L.C. (“Thayn”), a qualifying facility (“QF”) under the Public Utility Regulatory Policies Act (“PURPA”) that has sold power to RMP for many years. While Thayn and RMP were working to finalize Thayn’s renewed PPA pursuant to RMP’s Electric Service Schedule No. 37, Avoided Cost Purchases from Qualifying Facilities (“Schedule 37”), the Commission issued two orders that modified standard contract terms for Schedule 37 QFs.

Specifically, on September 18, 2015, the Commission issued an order adjusting pricing under Schedule 37 (“Pricing Order”) ¹ and on January 7, 2016, the Commission issued an order decreasing the maximum QF contract term for all QF PPAs from 20 to 15 years (“Contract Duration Order”). ² Disagreement subsequently emerged between Thayn and RMP as to whether Thayn’s in-process PPA was eligible to receive the pricing and contract duration in effect before the Commission issued these two orders (hereafter, the “Prior Terms”). After Thayn filed an informal complaint with the Division, RMP filed its Application requesting the Commission “issue an order determining the price and contract terms” for Thayn’s PPA. (Application at 7.)

The Commission held a scheduling conference on February 16, 2016 and issued a Scheduling Order and Notice of Hearing the following day, establishing due dates for intervention and comments and setting the matter for hearing on March 15, 2016. In early March, the Division of Public Utilities (“Division”), the Office of Consumer Services (“Office”) and Thayn filed comments on the Application. In its comments, the Division noted Thayn’s claim to the Prior Terms “may be based upon the idea of [a] legally enforceable obligation [“LEO”] ... as defined by [the Federal Energy Regulatory Commission]” but represented the Division “is not going to litigate the point in this matter.” (Division Comments at 5-6.) The Division’s comments nevertheless concluded “that it is in the public interest in this matter to grant Thayn ... the [earlier] Schedule 37 pricing.” (*Id.*) In its initial comments, the Office did not specifically refer to the notion of a LEO but questioned whether the parties had agreed to all material terms prior to the Commission issuing its Pricing Order. (Office Comments at 2.) Likewise, Thayn did not assert that a LEO existed prior to the Commission’s Pricing Order in its initial comments, instead Thayn argued that allowing it to contract under the Prior Terms “would be just and reasonable, would not have a material impact on [RMP’s] finances or its ratepayers, and is well-supported by the facts of this case.” (Thayn Comments at 4.)

*2 Having reviewed these comments, the Commission issued its Provisional Conclusion of Law on March 4, 2016 (“March 4 Order”), concluding: “In the absence of a showing that a LEO existed that entitles Thayn to otherwise outdated terms or prices, the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff.” (March 4 Order at 4.)

On March 10, 2016, RMP filed its Unopposed Motion to Suspend Schedule and Request for Expedited Treatment, requesting the Commission suspend the existing schedule and set the matter for another scheduling conference. The Commission granted the unopposed motion and held another scheduling conference on March 15, 2016. Subsequently, the Commission issued its First Amended Scheduling Order and Notice of Hearing, establishing a new schedule that allowed the parties an opportunity to submit legal briefing and set the hearing for June 9, 2016.

On April 15, 2016, Thayn filed its Initial Brief. The Commission received responsive briefs from the Division, the Office, RMP and Intervenor Ellis-Hall Consultants, LLC (“Ellis-Hall”) on May 6, 2016. Thayn filed a brief in reply on May 27, 2016. The Commission held a hearing on June 9, 2016. Thayn, RMP, the Division and the Office all appeared and presented testimony. Representatives for Ellis-Hall attended the hearing but did not present evidence or argument.

2. FACTUAL BACKGROUND

Thayn operates a relatively small, 575 kW, hydroelectric plant near the city of Green River, Utah. (Hr’g Tr. at 32:18-19.) Thayn commenced selling power to RMP in the early 1990s. (*Id.* at 31:21-24.) After selling RMP power “for three or four years on a short-term basis,” Thayn entered into a 20-year PPA with RMP spanning from 1996 through December 31, 2015. (*Id.* at 32:1-2, 34:1-2; Application at 3.)

Thayn’s representative, Rick Kaster, testified that he contacted John Younie at RMP, by telephone, about renewing the soon-to-expire PPA on July 7, 2015. (Hr’g Tr. at 33:21-25.) Mr. Kaster testified that Thayn had been working with Mr. Younie, in his capacity at RMP, for “at least ten years ... or so.” (*Id.* at 33:13-16.) Mr. Kaster testified that Mr. Younie provided him with the current pricing in effect and notified him efforts were underway to revise the pricing. (*Id.* at 34:3-8.) On or about July 14, 2015, RMP delivered a draft PPA to Thayn, containing the following disclosure: **“THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR ANY AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON SATISFACTION OF ALL REQUIREMENTS OF SCHEDULE 37.”** (Office’s Resp. Br. at 3 (all emphasis in original); *see also* Hr’g Tr. at 14:8-12.) The Office represents discovery exchanged between the parties shows Thayn sent a redlined version of the agreement to RMP on July 17, 2016. (Office Resp. Br. at 4.)

*3 Apparently concerned about potential changes to the pricing, Mr. Kaster testified he had a telephone conversation with Mr. Younie on July 22 in which he “asked John [Younie] if there was any way [Thayn] could lock in the existing rates by, [*sic*] if we sent a letter of intent or something similar to that.” (Hr’g Tr. at 35:4-7.) Mr. Kaster states Mr. Younie responded “by saying that if [Thayn] committed to the existing rates via e-mail, that that would lock us in on those rates.” (*Id.* at 35:7-9.) To confirm the conversation, Mr. Kaster sent Mr. Younie an email later that day, writing: “As per our phone conversation today, [Thayn] would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.” (Thayn Initial Br. at Ex. A (parenthetical and emphasis in original, and hereafter the “July 22 Email”).)

Thayn alleges it had provided RMP with all information RMP requested to finalize the draft PPA by July 31, 2015. (Thayn’s Initial Br. at 4; Office Resp. Br. at 4.) On August 4, 2015, Mr. Younie sent Mr. Kaster an updated redline of the draft PPA and notified him that Mr. Younie was leaving for vacation and would not return until August 17, 2015. (Office Resp. Br. at Ex. A.) The same day, Mr. Kaster responded and inquired about the necessity of a clause in the draft requiring Thayn to procure a \$5 million umbrella insurance policy, which constituted a significant increase over the insurance requirements in Thayn’s existing, soon-to-expire PPA. (*Id.*)

Mr. Kaster testified at hearing that, while he inquired about the necessity of the new insurance requirement, “there [were] no deal breakers,” from Thayn’s perspective in RMP’s template PPA. (Hr’g Tr. at 37:1-2.) Mr. Kaster testified that had RMP insisted on the \$5 million umbrella policy, Thayn “would have signed [the PPA],” explaining “[i]t didn’t matter what [RMP’s] answer was, whether it was 5 million or 3 million or no umbrella, we were going to sign the contract.” (*Id.* at 39:2-5.) Mr. Kaster testified that Thayn never considered failing to renew its expiring PPA or selling its output to anyone other than RMP. (*Id.* at

34:18.) Mr. Kaster further represented that, given the small nature of Thayn's hydroelectric project, it would be cost prohibitive for Thayn to sell its output to a third party. (*Id.* at 34:21-23.)

Thayn represents Mr. Younie contacted Thayn on August 29, 2015 and informed it that Mr. Younie's employment with RMP would end on September 1, 2015 and that further discussion regarding its PPA renewal should be directed to Bruce Griswold at RMP. (Thayn's Initial Br. at 4.) Mr. Kaster testified he emailed Mr. Griswold on September 1, 2015, communicating that "as far as [he] was concerned, the PPA was done" and the only thing Thayn "was waiting on was ... the insurance question." (Hr'g Tr. at 38:15-19.) According to Mr. Kaster, Mr. Griswold replied that he would respond in two days. (*Id.* at 38:22.) Mr. Kaster testified the next communication Thayn received from RMP was a voicemail RMP's Kyle Moore left him on September 16, 2015, notifying Mr. Kaster that Mr. Moore was replacing Mr. Younie as Thayn's contact at RMP. (*Id.* at 39:19-21.) Mr. Kaster testified he responded to this communication and reiterated Thayn's question about the insurance requirement. (*Id.* at 39: 21-23.)

*4 On September 18, 2015, four days after holding a hearing, the Commission issued its Pricing Order, reducing the price QFs, like Thayn, are eligible to receive under Schedule 37. Although the hearing had long been noticed to occur on September 14, 2015, RMP concedes the issuance of the Pricing Order that same week caught it "off guard." (*See* Hr'g Tr. at 18:3-6 (P. Clements testifying "It is unusual for the commission to issue an order so quickly following a contested proceeding. To be honest, the issuance of the pricing order so soon after the hearing caught the parties off guard.").) RMP further conceded at hearing that "it is reasonable to assume the parties could have finalized negotiations and possibly entered into a contract prior to the pricing order had the parties known in advance that the order was imminent." (*Id.* at 18:8-12.)

On September 25, 2015, Mr. Moore of RMP sent Mr. Kaster an email, stating: "Thanks for your patience as I corresponded with our insurance folks up the line. After speaking with them about the situation they felt like they could come down to a \$3 million umbrella policy" (Office Resp. Br. at Ex. B.) On October 1, Mr. Kaster responded to verify that Thayn would obtain the \$3 million umbrella policy and noted that he did not "see any other issues" with the draft PPA aside from filling in the Prior Terms to which Mr. Younie and he had previously agreed. (*Id.* at Ex. C.)

On October 13, Mr. Kaster followed up with Mr. Moore and requested a final draft of the PPA. (*Id.* at 6, Ex. D.) Mr. Moore replied that in light of the Pricing Order, RMP "will be [un]able to offer the previous price" because no "signed contract" existed. (*Id.*) Mr. Moore included in the email an attachment that provided updated pricing. Mr. Kaster responded: "I would ask that you reconsider your decision and honor the representations made to us and save all of us the trouble of a formal complaint/review procedure." (*Id.*)

On November 27, 2015, Thayn filed an Informal Complaint with the Division asserting its right to the Prior Terms. On January 7, 2016, the Commission issued its Duration Order, reducing the maximum QF PPA term from 20 to 15 years. Finally, on February 4, 2016, RMP filed its Application, requesting the Commission set the price and term of Thayn's PPA. Pending the outcome of this proceeding, Thayn is currently selling power to RMP at updated Schedule 37 prices under an interim PPA. (Hr'g Tr. at 33:2-9.) Thayn has requested the Commission order RMP to enter a PPA that complies with the Prior Terms and to "true up" any payments made under the interim PPA to comply with the pricing in effect prior to the Pricing Order. (*Id.* at 42:16-20.)

3. POSITIONS OF THE PARTIES

*5 All of the parties support the Commission reaching the same conclusion (*i.e.* order RMP to enter a PPA with Thayn based on the Prior Terms) but disagree on the means by which the Commission should reach it. Because the generating capacity at issue is relatively small and the number of intervenors limited, the parties generally urge us not to adopt broad conclusions here as to how and when a LEO is created.

RMP advocates for the narrowest construction of a LEO, arguing a LEO "requires a showing that there would have been a contract but for the actions of the utility." (RMP Resp. Br. at 7.) RMP maintains Thayn has failed to make such a showing but does not oppose the Commission exercising its "broad discretion" to find Thayn is entitled to the Prior Terms. (*Id.* at 11.)

Thayn argues the issue “rests on the question of whether the QF committed itself to sell power to the utility” and maintains it so committed itself when Mr. Kaster sent his July 22 Email to Mr. Younie stating Thayn “would like to commit” to a contract. (Thayn Initial Br. at 7, 10.)

The Office generally supports the standard for which Thayn advocates and “proposes that, under the facts of this case, the approach most consistent with the [Federal Energy Regulatory Commission's] regulations and general Utah law is the approach requiring a QF to unconditionally commit to sell its energy and/or capacity and to do everything in its power to establish a contract.” (Office Resp. Br. at 13.) The Office adds that under such a scenario, “a contract would be formed but for the reluctance of the utility.” (*Id.*) The Office also notes “there is apparent consensus [among states] that for a LEO to arise the QF project must be sufficiently developed to demonstrate its viability.” (*Id.* at 11 (citing *Whitehall Wind LLC v. Montana Public Service Comm'n*, 347 P.3d 1273, 1276-77 (Mont. 2015); *South River Power Partners v. Penn. Public Utility Comm'n*, 696 A.2d 926, 930 (Penn. 1997).) While the Office offers illuminating legal context and analysis of the facts, it does not take a position as to whether the Commission should or should not find a LEO exists that entitles Thayn to the Prior Terms. The Office concludes the record is “ambiguous” as to who was responsible for the delay in contract execution, and the Office appears to defer to the Commission as to whether the continued discussions surrounding the insurance requirement precluded a LEO from arising. (Office Resp. Br. at 15.)

For its part, the Division does not advance a particular standard for establishing a LEO, but asserts the facts support finding a LEO exists in this case, placing special emphasis on the distinction between Thayn's long-existing project and a “green field” or new project. (Division Resp. at 4-5.) Thayn also emphasizes this distinction, arguing the Commission should distinguish existing projects from new projects because the latter require a more complex inquiry. (Thayn Initial Br. at 7-8 (explaining “the development of a new QF can be a complex process and necessarily involves significant capital investment and multiple regulatory approvals”).)³

4. FINDINGS AND CONCLUSIONS

*6 RMP and Thayn both assert the Commission could exercise its discretion to grant Thayn a PPA that incorporates the Prior Terms and refer to our December 2, 2015 order in *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC*, Docket No. 15-035-70 wherein the Commission found “extenuating circumstances” warranted an extension of the applicable deadline for contract execution under RMP's Electric Service Schedule No. 38, Qualifying Facility Procedures (“Schedule 38”). We disagree. Schedule 38 facilitates larger QF projects obtaining individualized pricing according to, among other things, their position in a pricing queue. To retain their quoted pricing and queue position, a Schedule 38 QF must finalize its contract within the time frames outlined in the tariff. However, that tariff expressly authorizes the Commission to extend deadlines for “extenuating circumstances.” By contrast, Schedule 37 applies to smaller QF projects and contains published rates that are applicable to all eligible qualifying facilities. The rates are periodically revised and new tariff sheets are published to reflect the changes. Schedule 37 contains no language authorizing the Commission to grant a QF pricing from an outdated version of the schedule for “extenuating circumstances” or otherwise. Accordingly, the Commission reaffirms its March 4 Order and will not order RMP to enter a contract with Thayn under the Prior Terms absent a showing a LEO exists that entitles Thayn to them.

As we stated in our March 4 Order, we are aware the Code of Federal Regulations uses the term “legally enforceable obligation” in addition to the term “contract” and that the Federal Energy Regulatory Commission (“FERC”) has held a LEO may exist prior to the execution of a written contract. (*See, e.g.*, March 4 Order at 3; *see also* 18 C.F.R. § 292.304; *Grouse Creek Wind Park, LLC*, 142 F.E.R.C. P61,187 (2013).) We also understand FERC has left it to state commissions to determine the date a LEO is incurred under their state's law and to do so in a manner consistent with PURPA and its implementing regulations. *See, e.g.*, *Cedar Creek Wind, LLC*, 137 F.E.R.C. P61,006 (2011).

The Commission confesses that it finds FERC's “LEO” concept somewhat perplexing. The distinction between a “legally enforceable obligation” and a “contract” is not intuitive or easy to discern. According to FERC, a LEO arises only after a QF

“commits itself” to provide capacity and/or energy to a utility. *Id.* However, if a QF “breaches” a LEO, to the extent such a thing can occur, we do not have jurisdiction to afford the utility a remedy. We cannot say whether a cause of action would lie against the QF in a court of law. For example, if an applicable statute of frauds otherwise precluded the finding that an enforceable contract exists, would a court nevertheless grant specific performance or damages against a QF for breaching a LEO? We are not empowered to answer such questions. Perhaps, FERC does not contemplate that a remedy must exist in equity or at law against a QF who fails to perform under a LEO. If so, the term “legally enforceable obligation” does not seem apt.

*7 Regardless, while the concept is somewhat amorphous, FERC's intention in adopting it is explicit: “[u]se of the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.” 45 Fed. Reg. 12214, 12224 (Feb. 25, 1980). FERC's orders in *Grouse Creek* and *Cedar Creek*, providing that a written contract cannot be an absolute prerequisite to the creation of a LEO, are entirely consistent with FERC's originally stated goal of precluding utilities from denying or delaying a QF's opportunities under PURPA by refusing to enter a contract.

Here, Thayn and RMP plainly failed to enter into a written contract prior to the Commission's Pricing Order. Thayn maintains it is nevertheless entitled to the Prior Terms because a LEO was created when Mr. Kaster sent RMP his July 22 Email, committing Thayn to the then-existing price and a 20-year term. RMP disagrees a LEO exists but, as noted, does not object to the Commission using its discretion to order RMP to enter into a PPA containing the Prior Terms. The parties generally agree that this docket, involving a relatively small QF (in terms of its output) and only one intervenor, is not an opportune proceeding for the Commission to make broad determinations of law as to how and when a LEO is created. Nevertheless, we must apply some standard in order to determine whether Thayn has satisfied it.

a. Showing a Contract Would Have Existed “But For” the Actions of a Utility is Sufficient to Establish a LEO; The Commission Does Not Decide Here Whether Such a Showing is Necessary.

Of the parties, RMP has posited the most stringent standard for establishing a LEO, asserting it requires a “showing that there would have been a contract but for the actions of the utility.” (RMP Resp. Br. at 7.) RMP's proposed standard places a relatively high burden on the QF, which is required to show not only that it “committed itself” to sell but also to show the utility did something (or failed to do something) that interfered with the QF's ability to enter a contract. This standard is narrowly constructed to address FERC's concern that utilities might circumvent PURPA by refusing to enter a contract.

The successful negotiation and execution of a QF's PPA will always be contingent on the utility working to advance the process, and it cannot be enough that a QF show a contract would have existed “but for” the utility's failure to move the process forward according to the QF's expectations or some other potentially arbitrary measure. As we understand and employ it, the “but for” standard implies and requires a finding that the utility acted in a manner inconsistent with the standard customs and practices attendant to the negotiation and execution of QF PPAs and that “but for” such actions the parties would have entered a contract.⁴

*8 We hold a QF that satisfies this standard has made a showing *sufficient* to establish a LEO. Because we find Thayn has satisfied this standard, we need not reach the question of whether meeting this standard is *necessary*. In other words, we reserve judgment as to whether a LEO might be shown to exist under other circumstances wherein a QF presents evidence that it “committed itself” to provide energy or capacity but cannot show, for whatever reason, a contract would have existed “but for” the utility's actions.

b. The Evidence Supports Thayn's Contention that It Would Have Finalized Its Contract Prior to the Pricing Order “But For” RMP's Representation that an Email was Sufficient to “Lock In” the Price and Term.

Uncontroverted evidence supports the dispositive fact in this case: RMP's authorized agent, Mr. Younie, represented to Mr. Kaster that Thayn could “lock in” a contract under the Prior Terms by sending RMP an email declaring its intention to do so. Mr. Kaster testified:

I had asked John [Younie] if there was any way we could lock in the existing rates by [*sic*], if we sent a letter of intent or something similar to that. And he responded by saying that if we committed to the existing rates via e-mail, that that would lock us in on those rates. So later that day I sent that [July 22] e-mail.

(Hr'g Tr. at 35:4-10.) Mr. Kaster's July 22 Email corroborates his testimony. Mr. Kaster wrote: “As per our phone conversation today, [Thayn] would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.” (Thayn Initial Br. at Ex. A (parenthetical and emphasis in original).) Mr. Kaster's intention to solidify the price and term of the contract is clear from the text of the email as is his belief the email is sufficient to do so “per” his conversation with Mr. Younie. No evidence in the record suggests Mr. Kaster's email or his testimony overstate the representations Mr. Younie made to him about the efficacy of an email to establish these terms. Mr. Younie did not testify at the hearing or provide any other statement to the Commission. Mr. Kaster's uncontested testimony and his email are the only evidence in the record that address the contents of their conversation.

Additionally, under these circumstances, we find it was not unreasonable for Mr. Kaster to rely on Mr. Younie's representation. Thayn had a well-established commercial relationship with RMP and a long history of contractual performance for this same facility pursuant to the terms of a similar, 20-year PPA. Moreover, the available evidence suggests Thayn had no other commercially viable “takers” for its output. These circumstances provided RMP with ample assurance that Thayn would be able and willing to perform under the contract renewal it sought in July 2015. In this context, it was not unreasonable for Mr. Kaster to accept and rely on Mr. Younie's representation that an emailed commitment would be sufficient to establish the price and duration of Thayn's renewed PPA.

*9 Under the totality of these specific circumstances, we find that “but for” Mr. Younie's actions — specifically his representation to Mr. Kaster that an email would be sufficient to “lock in” the Prior Terms — Thayn would have finalized its contract prior to the Pricing Order. Given its long history of operation and the absence of any other feasible purchasers, we find Mr. Kaster's testimony that RMP's standard form of PPA contained no “deal breakers” to be credible. We find that “but for” Mr. Younie's assurances, Thayn would not have relied on its July 22 Email and would have finalized its contract with RMP before September 18, 2015. While RMP denies a contract would have existed “but for” its actions, RMP concedes the Commission's Pricing Order caught the parties “off guard” and that “it is reasonable to assume the parties could have finalized negotiations and possibly entered into a contract prior to the pricing order had the parties known in advance that the order was imminent.” (Hr'g Tr. at 18: 8-12.)

Though RMP should timely respond to any inquiries about a QF contract, our findings here should not be interpreted to suggest the Commission will find a LEO exists whenever RMP fails to respond to an email from a QF developer purporting to “commit itself” to provide energy or capacity at a specified price. A QF seeking a PPA on an as yet undeveloped, or “green field,” project would be subject to less credulity and should expect to satisfy customary standards and diligence requirements before enjoying an enforceable LEO, including any information and project requirements spelled out in the tariff. Similarly, evidence showing RMP had any reason to doubt an existing QF's ability or willingness to perform under a renewed contract would be relevant to the inquiry.

In summary, on these facts, we find a LEO, as the term is used in [18 C.F.R. § 292.304](#), exists that entitles Thayn to the Prior Terms. We need not decide the precise date on which the LEO was incurred. It should suffice to find the LEO arose after Mr. Kaster sent his July 22 Email and a reasonable amount of time expired without Mr. Younie or someone else at RMP putting

Thayn on notice Thayn's commitment in the email was insufficient to establish the contract price and term. Such time certainly expired long before the Commission issued its Pricing Order nearly two months later, on September 18, 2015.

5. ORDER

Consistent with the foregoing, the Commission orders:

- (1) RMP will execute a PPA with Thayn at the prices in effect in July 2015 for a term of 20 years, effective January 1, 2016 or some other date upon which the parties can mutually agree;
- (2) With respect to all power Thayn provides or has provided under the interim PPA, RMP will compensate Thayn for the difference in price between the interim price and the price under the PPA to be entered under Ordering Paragraph 1.

***10** DATED at Salt Lake City, Utah, July 29, 2016.

Approved and confirmed July 29, 2016 as the Order of the Public Service Commission of Utah.

Attest:

Gary L. Widerburg

Commission Secretary

Footnotes

- [1](#) Report and Order dated September 18, 2015, *In the Matter of Rocky Mountain Power's Proposed Revisions to Electric Service Schedule No. 37, Avoided Cost Purchases from Qualifying Facilities*, Docket No. 15-035-T06.
- [2](#) Order dated January 7, 2016, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, Docket No. 15-035-53.
- [3](#) Intervenor Ellis-Hall filed briefing in support of Thayn, citing FERC precedent standing for the proposition that a LEO may exist prior to the execution of a written contract. Ellis-Hall's comments do not offer argument as to what test or factors the Commission should consider in determining whether and when a LEO is created.
- [4](#) Of course, such standard customs and practices must, in turn, be commercially reasonable and consistent with PURPA and its implementing regulations.

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